

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re:

Cynthia L. Anderson,

Debtor(s).

BKY 04-43362

Chapter 13 Case

**NOTICE OF HEARING AND MOTION OBJECTING TO CONFIRMATION OF
CHAPTER 13 PLAN AND FOR DISMISSAL OR CONVERSION OF CASE**

TO: All parties in interest pursuant to Local Rule 9013-3:

1. Jasmine Z. Keller, Chapter 13 Trustee (the "Trustee"), by and through her undersigned attorneys, moves the court for the relief requested below and gives notice of hearing.

2. The court will hold a hearing on this motion at 10:30 a.m. on September 2, 2004, in Courtroom No. 7 West, United States Courthouse, 300 South 4th Street, Minneapolis, Minnesota.

3. Any response to this motion must be filed and delivered not later than 10:30 a.m. on September 1, 2004, which is 24 hours (1 business day) before the time set for the hearing, or filed and served by mail not later than August 30, 2004, which is three business days before the time set for the hearing. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this chapter 13 case was filed on June 15, 2004. The case is now pending in this court.

5. This motion arises under 11 U.S.C. § 1322 and 1325 and Bankruptcy Rule 3015. This motion is filed under Bankruptcy Rule 9014 and Local Rules 3015-3, 9006-1, 9013-1 through 9013-5, and such other Local Rules as may apply. Movant requests relief with respect to denial of confirmation of the debtor's proposed Chapter 13 plan dated June 15, 2004 (the "Plan") and for dismissal or conversion of the case, whichever is in the best interests of the debtor's creditors.

6. On her Statement of Financial Affairs ("SOFA") on file herein, in item 10, the debtor states: "I cashed out a 401K in Feb 2004. I used the \$28,000 in proceeds to

pay debt.”

7. At the meeting of creditors held pursuant to 11 U.S.C. § 341(a) on July 14, 2004, the Trustee’s undersigned representative inquired as to the identities of the creditors who were paid and the amounts each creditor received. The debtor testified that she paid Border State Bank the sum of \$8,000, to pay its debt in full, and she paid \$3,500 to an unidentified private party. The debtor also stated that \$9,000 was withheld from the proceeds of the 401k distribution to pay state and federal income taxes.

8. The Trustee’s representative requested at the 341 meeting that the debtor provide the Trustee with copies of the note to Border State Bank that was paid and details regarding the creditors, amounts, and dates of payment of the other debts paid from the 401k funds prior to the commencement of the case. To date, the debtor has failed and refused to comply with this request, although the confirmation hearing was continued from August 5, 2004, to give her additional time to come up with this information.

9. Without the requested information, the Trustee cannot determine the extent to which any of the debtor’s large pre-petition payments may be avoidable as preferences or fraudulent transfers.

10. The Trustee therefore objects to confirmation of the Plan on the grounds that the Plan does not meet the “best interests of creditors” test of 11 U.S.C. § 1325(a)(4), in that the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is less than the amount that would be paid on such claim if the estate of the debtor – including avoided transfers – was liquidated under Chapter 7 of Title 11 on such date.

11. The Trustee further alleges that the debtor’s failure to cooperate with the Trustee in fully responding to her reasonable requests for information violates the debtor’s statutory duty under 11 U.S.C. § 521(3) and justifies dismissal or conversion of this case under 11 U.S.C. § 1307(c).

12. If necessary, an employee of the Trustee, and/or the debtor, may be called to testify as to the matters alleged in this motion.

WHEREFORE, the Trustee requests an order as follows:

1. Denying confirmation of the debtor’s Chapter 13 Plan.
2. Dismissing or converting this case to a case under Chapter 7 of Title 11, United States Code, whichever is in the best interests of the debtor’s creditors and the estate.

Jasmine Z. Keller, Chapter 13 Trustee

Dated: August 24, 2004

/e/ Thomas E. Johnson

Thomas E. Johnson, ID # 52000

Margaret H. Culp, ID # 180609

Counsel for Chapter 13 Trustee

310 Plymouth Building

12 South 6th Street

Minneapolis, MN 55402-1521

(612) 338-7591

VERIFICATION

I, Thomas E. Johnson, employed by Jasmine Z. Keller, Chapter 13 Trustee, the movant named in the foregoing notice of hearing and motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed: August 24, 2004

/e/ Thomas E. Johnson

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
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Chapter 13 Case

**MEMORANDUM IN SUPPORT OF OBJECTION TO CONFIRMATION
AND MOTION TO DISMISS CASE**

FACTS

The facts supporting the Trustee's objection are summarized in the accompanying motion and will not be repeated here. The Trustee also relies on the representations made by the debtor in his Schedules.

LEGAL DISCUSSION

Section 1325(a)(4) of the Bankruptcy Code states the so-called "best interests of creditors" test. Under this section, a proposed Chapter 13 plan can only be confirmed if:

the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.

11 U.S.C. § 1325(a)(4).

The liquidation value of the debtor's estate under Chapter 7 includes not only the value of the debtors' nonexempt assets, but also the value of any transfers avoidable by the Chapter 7 trustee under the avoiding powers found in subchapter III of chapter 5, title 11, U.S. Code. *In re Larson*, 245 B.R. 609, 614 (Bankr. D. Minn. 2000). In the present case, the Trustee contends that the value of the debtor's nonexempt estate includes an undetermined amount of preferential or fraudulent pre-petition transfers.

Even if the debtor were able to establish that the pre-petition transfers came from exempt or excluded property, the Trustee contends that the transfers are still avoidable under 11 U.S.C. § 547. The preference avoidance statute only requires that the transfer be "of an interest of the debtor in property", regardless of whether the property transferred is exempt. *See, In re Owen*, 104 B.R. 929 (C.D. Ill. 1989) (reversing the bankruptcy court's determination that exempt property could not be the subject of a preference action); *In re Noblit*, 72 F.3d 757 (9th Cir. 1995) (transferees from debtor

could not defend against trustee's avoidance action by claiming that the property transferred was exempt: "If the exempt property is transferred, the debtor has in essence waived the exemption, and the transferee cannot avail herself of the exemption in a subsequent avoidance action." 72 F.3d at 758 (*internal citation omitted*)).

Due to the debtor's failure to explain and provide details (including dates of payments) concerning the pre-petition transfers, the Trustee cannot quantify the precise dollar amount of the potentially avoidable transfers. Nevertheless, the Trustee contends that at least a prima facie case has been made out that the Plan does not meet the "best interests" test, and the debtor should be put to her strict proof on this issue.

The Court has the power to dismiss or convert the debtor's case for "cause," and a nonexclusive list of grounds for dismissal is included in the statute, 11 U.S.C. § 1307(c). The Trustee argues that the present plan is unconfirmable and the situation has become exacerbated due to the debtor's unresponsiveness to the Trustee's reasonable requests for information concerning the questionable pre-petition payments to creditors. While the Trustee has drafted the proposed order in this case to provide for dismissal, the Court in its discretion may determine that conversion to Chapter 7 is in the best interests of the debtor's creditors.

CONCLUSION

For the reasons stated herein, the Trustee respectfully requests that confirmation of the debtor's proposed Chapter 13 plan be denied, and that this case be dismissed.

Respectfully submitted:

Dated: August 24, 2004

/e/ Thomas E. Johnson
Thomas E. Johnson, ID # 52000
Margaret H. Culp, ID # 180609
Counsel for Chapter 13 Trustee
310 Plymouth Building
12 South 6th Street
Minneapolis, MN 55402-1521
(612) 338-7591

UNITED STATES BANKRUPTCY COURT
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UNSWORN DECLARATION FOR PROOF OF SERVICE

I, Thomas E. Johnson, employed by Jasmine Z. Keller, Chapter 13 Trustee, declare that on August 24, 2004, I served Notice of Hearing and Motion Objecting to Confirmation of Chapter 13 Plan, Memorandum of Facts and Law, and proposed Order Denying Confirmation of Chapter 13 Plan and Converting Case on the individual(s) listed below, in the manner described:

By electronic means:

United States Trustee
1015 United States Courthouse
300 South 4th Street
Minneapolis, MN 55415

By first class U.S. mail, postage prepaid:

Cynthia L. Anderson
4935 Baker Road
Minnetonka, MN 55343

Jeffrey M. Bruzek, Esq.
Prescott & Pearson, P.A.
PO Box 120088
New Brighton, MN 55112

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: August 24, 2004

/e/ Thomas E. Johnson

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
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Chapter 13 Case

**ORDER DENYING CONFIRMATION OF CHAPTER 13 PLAN AND
DISMISSING CASE**

At Minneapolis, MN, _____, 2004.

The above-entitled matter came on for hearing before the undersigned United States Bankruptcy Judge on the Chapter 13 Trustee's objection to confirmation of the debtor's proposed Chapter 13 plan and motion to dismiss or convert the case.

Appearances were noted in the minutes.

Upon the foregoing objection, arguments of counsel, and all of the files, records and proceedings herein:

IT IS ORDERED:

1. Confirmation of the debtor's Chapter 13 plan is DENIED.
2. This case is DISMISSED.

United States Bankruptcy Judge